No. 138, Original

IN THE

Supreme Court of the United States

STATE OF SOUTH CAROLINA,

Plaintiff,

v.

STATE OF NORTH CAROLINA,

Defendant.

CATAWBA RIVER WATER SUPPLY PROJECT;
CITY OF CHARLOTTE, N.C.; AND
DUKE ENERGY CAROLINAS, LLC,

Intervenors.

On Exceptions to the
First Interim Report of the Special Master

REPLY OF CATAWBA RIVER WATER SUPPLY PROJECT TO EXCEPTIONS OF SOUTH CAROLINA TO THE FIRST INTERIM REPORT OF THE SPECIAL MASTER

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QUESTION PRESENTED

In this original action, South Carolina seeks an equitable apportionment of the Catawba River, including an injunction against an ongoing interbasin transfer of water by Catawba River Water Supply Project (CRWSP), which is a bi-state entity supplying water to both North and South Carolina. In the suit, neither state will represent CRWSP's interests because each has a significant incentive to limit CRWSP's water deliveries to the other.

The Question Presented is:

Did the Special Master err in recommending that CRWSP be permitted to intervene for the limited purpose of protecting its interests?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. CRWSP's Bi-State Joint Venture 4

II. The Special Master Correctly Concluded That CRWSP Has A Compelling Interest In Intervening In This Action 7

a. South Carolina's Complaint Specifically Targets North Carolina's IBT 8

b. South Carolina's Complaint Seeks An Injunction Against Particular IBTs 11

c. South Carolina's Requested Injunction Is Directed At CRWSP's IBT For UC-NC 12

d. Beyond South Carolina's Specific Request For Injunctive Relief, Its Request To Equitably Apportion The Catawba River May Result In Limits On Particular Water Users 16

III. The Party States Will Not Adequately Represent CRWSP's Compelling Interest In The Outcome Of This Litigation 19

IV. The Special Master Properly Recognized That CRWSP's Limited Role In The Litigation Reinforces The Conclusion That Intervention Is Appropriate 25

V. This Court's Precedents Establish That CRWSP's Intervention Is Appropriate 29

CONCLUSION 42

TABLE OF AUTHORITIES

Page

Cases

Alfred L. Snapp & Son v. Puerto Rico,
458 U.S. 592 (1982) 37

Arizona v. California,
460 U.S. 605 (1983) 39, 40
530 U.S. 392 (2000) 31

J.B. Stringfellow, Jr. v. Concerned Neighbors in Action,
480 U.S. 370 (1987) 25

Lowcountry Open Land Trust v. State,
347 S.C. 96 (S.C. Ct. App. 2001) 23

Maryland v. Louisiana,
451 U.S. 725 (1981) ..... passim

Nebraska v. Wyoming,
325 U.S. 665 (1945) 17
507 U.S. 584 (1993) 33
515 U.S. 1 (1995) 38

New Jersey v. New York,
345 U.S. 369 (1953) ..... passim

Oklahoma v. Texas,
258 U.S. 574 (1922) 32

Pennsylvania v. West Virginia,
262 U.S. 553 (1923) 37

Texas v. Louisiana,
426 U.S. 465 (1976) ..... passim

Utah v. United States,
394 U.S. 89 (1969) 32

Washington v. Washington State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979) 37

Wyoming v. Colorado, 298 U.S. 573 (1936) 17

Judicial Materials

First Interim Report of the Special Master, *Nebraska v. Wyoming*, No. 108, Orig. (June 14, 1989) 33

Report of the Special Master, *Maryland v. Louisiana*, No. 83, Orig. (May 14, 1980) 32

Report of the Special Master, *Alaska v. United States*, No. 128, Orig. (Nov. 27, 2001) 40

Seventeenth Memorandum of the Special Master, *Nebraska v. Wyoming*, No. 108, Orig. (Apr. 2, 1959) 2, 33, 34, 40

Rules

Advisory Committee Note to 1966 Amendment of Fed. R. Civ. P. 24(a)(1) 25

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The Catawba River Water Supply Project (CRWSP) respectfully replies to South Carolina's Exceptions to the First Interim Report (Report) of the Special Master, which correctly recommends that CRWSP be permitted to intervene for the limited purpose of defending against an equitable apportionment and injunction that South Carolina seeks against CRWSP.

SUMMARY OF THE ARGUMENT

This Court's precedents balance a putative intervenor's compelling interest in the outcome of an original action against the prospect that the party states will represent that interest and the concern that intervention would render the litigation unmanageable. The Court has rejected intervention by a municipality that sought only to protect its interest in the consumption of water. *New Jersey v. New York*, 345 U.S. 369 (1953) (per curiam). Conversely, it has permitted intervention by a municipality that claimed a property right in disputed lands (*Texas v. Louisiana*, 426 U.S. 465 (1976)), and by taxpayers who agreed with the party states that a state tax was unlawful (*Maryland v. Louisiana*, 451 U.S. 725 (1981)). In a closely analogous case on which South Carolina heavily relies, the Special Master permitted the intervention of a bi-state utility because the party states were conflicted in their advocacy of the utility's water withdrawals. Seventeenth Memorandum of Special Master, *Nebraska v. Wyoming*, No. 108, Orig. (Apr. 2, 1999).

The Special Master properly recommended that CRWSP be permitted to intervene in order to protect its "compelling interest" in the outcome of this case, given that CRWSP is no "mere user" of the Catawba River. CRWSP is a joint venture between units of local government in South Carolina and North Carolina. It operates a plant located in South Carolina that treats and distributes water from the River to roughly 100,000 individuals in each state. CRWSP's distribution includes millions of gallons per day of "interbasin transfer" to Union County, North

Carolina. CRWSP sought to intervene because South Carolina's Complaint seeks an equitable apportionment of the River and an injunction against that transfer by CRWSP.

The Special Master correctly recognized that CRWSP's interest in the outcome of the case is manifest. South Carolina specifically requests that this Court enter an order blocking an essential aspect of CRWSP's operations. An equitable apportionment decree also may specify that other withdrawals from or discharges into the River take priority over CRWSP's use. The forced reduction of CRWSP's water withdrawal sought by South Carolina would threaten CRWSP's ability to serve the citizens of *both* states by significantly reducing the revenues that sustain its operation.

Contrary to South Carolina's invocation of the principle of *parens patriae*, neither party state can or will represent CRWSP's compelling interest in maintaining its withdrawal of water from the Catawba River. Both South Carolina and North Carolina are heavily conflicted in their view of CRWSP's operations. South Carolina is obviously hostile to CRWSP's withdrawals of water for the benefit of North Carolina residents. Conversely, North Carolina has every incentive to seek an apportionment that would reduce CRWSP's withdrawals of millions of gallons per day for consumption in South Carolina. Even North Carolina's interest in defending CRWSP's North Carolina IBT is heavily compromised by its interest in maximizing the flow of the River north of the border and minimizing withdrawals in South Carolina.

The Special Master was attentive to concerns about the ability to administer this litigation and, at CRWSP's urging, recommended that intervention be allowed for the "limited purpose" of protecting its own interest in the outcome of the case. CRWSP is entitled to participate in order to develop and present facts relating to its operations. The Special Master's view that CRWSP's participation in that role would aid her resolution of the case should be afforded considerable deference. There is moreover no prospect that the case will devolve into an "intramural" dispute between CRWSP and other parties over the allocation of water within the states.

This Court accordingly should adopt the recommendation of the Special Master that CRWSP be permitted to intervene.

ARGUMENT

I. CRWSP's Bi-State Joint Venture

CRWSP is a bi-state entity – a joint venture created by Union County, North Carolina (UC-NC) and Lancaster County Water and Sewer District (LCWSD-SC), which is a unit of South Carolina local government. CRWSP was created principally to supply water to the rapidly growing, bi-state metropolitan population around Charlotte. UC-NC is North Carolina's fastest growing county, while Lancaster County's panhandle region is among South Carolina's most rapidly expanding areas.

During the 1980s, it became apparent that this bi-state area's water demand could not be fulfilled by sources other than the Catawba. In North Carolina, it was not economical to transfer water from the

Yadkin-Pee Dee and Rocky Rivers to population centers far to their west. In South Carolina, LCWSD-SC could not rely on its prior water source (Bear Creek) in light of burgeoning demand and significant water quality concerns.

Regulatory authorities in both states encouraged UC-NC and LCWSD-SC to join together and create CRWSP to advance the spirit of regionalism; to minimize the proliferation of water intakes along the Catawba River; and to spread the ever-rising costs of water treatment across a larger customer base, thereby reducing the cost of water to customers.

LCWSD-SC and UC-NC accordingly formed CRWSP to construct and operate a water treatment and distribution plant located in Lancaster County, South Carolina. In recognition of the dual-state nature of its obligations, CRWSP's advisory board is composed of representatives from both units of government. The boards of LCWSD-SC and UC-NC ultimately make the decisions that bind CRWSP. CRWSP has its own budget, revenues, expenses, assets and staff. It charges both joint venturers for their respective water purchases, using revenues to fund ongoing operations. CRWSP is a break-even undertaking, with any surplus used to defray the next year's expenses and any shortfall funded equally by LCWSD-SC and UC-NC.

CRWSP has invested more than $30 million in its water plant and related infrastructure, in addition to the infrastructure costs of the individual joint venture participants. The water plant and related infrastructure are owned by LCWSD-SC and UC-NC as tenants in common. To finance the joint venture, UC-NC has borrowed more than $7 million in general

obligation debt and in excess of $8 million in revenue debt. UC-NC has invested many millions more to extend a water line approximately eight miles across Lancaster County to a point of connection with its infrastructure in North Carolina (which is many miles east of the Catawba River). For its part, LCWSD-SC has incurred nearly $16 million in revenue debt.

The plant commenced operations in April 1993. It withdraws water from the Catawba River at a point approximately twenty-eight miles south of where the River crosses into South Carolina. Under normal flow conditions, CRWSP distributes an average of 9 MGD to LCWSD-SC, which is used to provide retail and wholesale water to nearly 30,000 customers (roughly 90,000 individual residents) in Chesterfield, Kershaw, and Lancaster Counties, in South Carolina, as well as an obligation to serve certain customers in Mecklenburg County, North Carolina. CRWSP distributes a further 12 MGD to UC-NC to provide retail service to nearly 37,000 customers (roughly 100,000 residents). At peak demand under normal flow conditions, CRWSP approaches full utilization of its current permit to operate, which is 36 MGD.

Though CRWSP's plant is physically located in South Carolina, it is regulated by both states. South Carolina has licensed CRWSP to withdraw 100 MGD from the Catawba, and permitted CRWSP to operate its plant at 36 MGD, which is the second-largest water treatment operation along the River. South Carolina's withdrawal authorization includes 20 MGD of permitted "interbasin transfer." An "IBT" is the forced movement of water from one river basin to

another. Of that 20 MGD of IBT, LCWSD-SC uses approximately 2 MGD; UC-NC uses 5 MGD; and the remaining 13 MGD is not utilized at this time. South Carolina (through its Department of Health and Environmental Control) has also granted permits for CRWSP to connect to the water distribution systems of LCWSD-SC and UC-NC.

North Carolina (through its Department of Environment and Natural Resources) granted a parallel permit for CRWSP to connect to UC-NC's system. North Carolina has also authorized an IBT by UC-NC of 5 MGD to move water to the east of the Catawba River basin, by "grandfathering" certain IBTs that were commenced prior to the enactment in 1991 of a statute governing IBTs. North Carolina has also permitted UC-NC to deliver water from CRWSP through UC-NC's distribution system in North Carolina to customers of UC-NC.

II. The Special Master Correctly Concluded That CRWSP Has A Compelling Interest In Intervening In This Action

The Special Master properly concluded that "CRWSP has a compelling interest in defending its ability to execute the transfer challenged by South Carolina and should be allowed to intervene for that limited purpose." Report 28. CRWSP has a significant and concrete interest in the outcome of this case that cannot be trivialized as that of a mere user of the Catawba River.

There is no dispute that CRWSP has a direct interest in preventing such a decree – whether favoring South Carolina or North Carolina – which would severely disrupt CRWSP's ongoing operations

and financial health. The joint venture incurs considerable operational costs that are spread over the revenue from the sale of water to both UC-NC and LCWSD-SC. Each joint venturer is responsible through its water purchase for one-half of the joint venture's cost of operations. CRWSP is not a profitable venture; it intentionally operates on a break-even budget. CRWSP has zero margin to accommodate net losses. A decree or injunction ordering CRWSP to reduce materially its water sales to either joint venturer (or both) would cause costs to be spread over fewer customers resulting in substantial rate increases, thereby endangering CRWSP's viability and its ability to supply the affordable water that it has provided for nearly two decades to the hundreds of thousands of customers who depend on it.

a. South Carolina's Complaint Specifically Targets North Carolina's IBT

South Carolina's Complaint specifically seeks to enjoin a substantial element of CRWSP's operations – the presently authorized 5 MGD IBT to UC-NC. Such an injunction would run directly against CRWSP, which is the entity that in fact withdraws water from the River and transfers it to UC-NC.

South Carolina argues to the contrary that its Complaint does not target IBTs and certainly does not seek an injunction against CRWSP's operations. South Carolina asserts that, although the Complaint does discuss IBTs, it does so merely as an "obvious example[] of North Carolina's over-consumption." Exceptions of the State of South Carolina to First Interim Report of the Special Master and Brief in

Support of Exceptions (S.C. Exceptions Br. or Br.) 6. South Carolina further maintains that "[t]he Complaint does not request, however, that any particular transfer be restrained, which is an *intra*state matter for North Carolina to determine consistent with its equitable share of the River." *Id.* South Carolina rests its position on the proposition that equitable apportionment "cases concern the federal law of apportionment of water *between* States, not the state-law questions of how water is allocated among competing interests *within* the State." *Id.* 14 (emphases in original).

As the Special Master recognized, South Carolina's assertions significantly misstate the contents of its Complaint, including the relief it seeks, as well as the nature of relief in equitable apportionment cases. The Complaint specifically targets North Carolina IBTs, which are not mere "examples" but instead the essence of South Carolina's claim that equitable apportionment is required. The Complaint alleges that current "interbasin transfer[s]" "exceed North Carolina's equitable share of the Catawba River." Compl. ¶¶ 3-4. The Complaint then devotes an entire section to "North Carolina's *unlawful* authorization of transfers from the Catawba River." *Id.* ¶¶ 18-25 (capitalization omitted from heading) (emphasis added). South Carolina specifically alleges these IBTs are "in excess of North Carolina's equitable share of the Catawba River" because they "necessarily reduce the amount of water available to flow into South Carolina" and "exacerbate the existing natural conditions and droughts that

contribute to low flow conditions in South Carolina and cause the harms detailed above." *Id.* ¶ 24.

South Carolina's briefing shows its near-exclusive focus on its request that this Court invalidate North Carolina's IBTs as inequitable. The Question Presented stated by South Carolina's brief in support of its Motion for leave to file a bill of complaint is: "Whether North Carolina's interbasin transfer statute is invalid" because it authorizes transfers "in excess of [North Carolina's] equitable share of the waters of [the Catawba] [R]iver." Br. of S.C. in Support of Motion for Leave to File Complaint (S.C. Complaint Br.) The first sentence of its Reply Brief is that "North Carolina's inequitable interbasin transfers of water out of the Catawba River Basin have caused – and continue to threaten – substantial harm to South Carolina during periods when the Catawba River is at less than adequate flows." Reply in Support of Request to File Complaint 1.

Given the foregoing, the Special Master properly concluded that "a fair reading of South Carolina's Complaint and other papers, including its preliminary injunction motion, shows that interbasin transfers are not merely 'mentioned,' but are the primary if not exclusive means by which South Carolina claims to have been harmed." Report 38. "South Carolina alleges that these interbasin transfers from the Catawba have reduced the amount of water flowing into South Carolina and exacerbated the existing natural conditions and droughts that cause low flow conditions in South Carolina." *Id.* 6.

b. South Carolina's Complaint Seeks An Injunction Against Particular IBTs

South Carolina equally mischaracterizes the relief sought by the Complaint, which in fact affirmatively seeks an injunction against IBTs. South Carolina asks this Court "to enjoin North Carolina from authorizing past or future [interbasin] transfers inconsistent with [an equitable] apportionment." Compl. ¶ 4. Its prayer for relief requests an Order "enjoining North Carolina from authorizing transfers of water from the Catawba River, past or future, inconsistent with [an equitable] apportionment, and also declaring that the North Carolina interbasin transfer statute is invalid to the extent that it authorizes transfers in excess of North Carolina's equitable apportionment as determined by this Court's decree." *Id.* 10.

Again, South Carolina's briefing reinforces the plain terms of its pleadings. In seeking leave to file its bill of complaint, South Carolina devoted an entire section of its brief to the proposition that "North Carolina should be enjoined from authorizing transfers from the river that are inconstant with [the equitable] apportionment." S.C. Complaint Br. 11. South Carolina explained that it sought an order "declaring North Carolina's interbasin statute invalid with respect to inequitable transfers out of the Catawba River, and *prohibiting* all transfers by North Carolina – past and future – that are inconsistent with that apportionment." *Id.* 9 (emphasis added). In opposition to CRWSP's intervention, South Carolina again reaffirmed its "alleg[ation] that North Carolina has taken and is taking more than its fair share of the river waters,

through a series of interbasin water transfers from the Catawba River" and reiterated its requests that this Court should equitably apportion the River and "enjoin" IBTs that are, according to the allegations of the Complaint, beyond North Carolina's equitable apportionment. Br. in Opp. to CRWSP Intervention 1.

South Carolina also has no explanation for why, in filing the Complaint, it also sought "a preliminary injunction that would have prevented North Carolina from authorizing additional transfers during the pendency of this litigation." S.C. Exceptions Br. 43 n.31. By definition, South Carolina could seek that form of "preliminary" relief only if it would equally have been included within the "permanent" injunction sought by the Complaint.

c. South Carolina's Requested Injunction Is Directed At CRWSP's IBT For UC-NC

The Complaint specifically identifies CRWSP's 5 MGD of IBT to UC-NC as inequitable and thus the subject of its request for an injunction. As the Special Master recognized, "the focus of South Carolina's Complaint is the North Carolina interbasin transfer statute and a small number of authorizations granted under that statute for transfers of water from the Catawba." Report 22. In discussing inequitable water uses, the Complaint explains that North Carolina law "grandfathers the transfer by Union County of at least 5 million gallons per day from the Catawba River Basin." Compl. ¶ 21. *Contra* S.C. Exceptions Br. 5-9, 42 (acknowledging that the Complaint addresses "two recent approved transfers and one requested transfer," but omitting

the Complaint's discussion of CRWSP's IBT). The Complaint identifies "an existing authorization to Union County to transfer at least 5 million gallons [of water] per day" (Report 5) and alleges "that *these interbasin transfers* from the Catawba have reduced the amount of water flowing into South Carolina and exacerbated the existing natural conditions and droughts that cause low flow conditions in South Carolina" and "are in excess of North Carolina's equitable share of the Catawba River" (*id.* 6 (emphasis added)).

Also relevant is the Complaint's allegation that the Bowater Pulp and Paper Mill has suffered inequitably low water flows. Compl. ¶ 17(d); *see also* S.C. Exceptions Br. 4 ("Bowater pulp and paper mill, for instance, paid more than $6,000 per day because the decreased water flow was insufficient to assimilate its treated wastewater consistent with state permits"). The Complaint is thus fairly understood as alleging that the availability of sufficient water for the Bowater facility is one measure of an equitable apportionment of the Catawba River. Of particular note, CRWSP's water intake is just upstream of Bowater's discharge point. South Carolina's attempt to ensure that additional flows are available to assimilate discharge from the Bowater facility necessarily implies a direct interest in significantly reducing CRWSP's adjacent upstream withdrawals.

South Carolina's attempt to suggest that its suit does not seek to define the scope of CRWSP's particular water use is also belied by its conduct in the litigation. During the last nine months that CRWSP has been in this case, South Carolina has

issued comprehensive discovery requests regarding CRWSP's operations. South Carolina has demanded that CRWSP produce a list of witnesses with knowledge about the allegations in the Complaint against CRWSP and the defenses of CRWSP against South Carolina, with six of the seven questions seeking information about UC-NC's IBT. South Carolina has also propounded twenty-three separate document requests upon CRWSP, of which eleven specifically pertain to the IBT of CRWSP, including UC-NC's IBT, and the remaining twelve are unique to CRWSP's use and location.

If South Carolina were just seeking a declaration that North Carolina was taking an inequitable share of the Catawba, as opposed to a determination that CRWSP's IBT to UC-NC is inequitable and should be enjoined, much of that effort would be unnecessary. It is instead evident that South Carolina is attempting to prove that CRWSP, particularly through its support of consumption by UC-NC in North Carolina, is harming other South Carolina uses of the River. Inexplicably, South Carolina has sued, in part, over a governmental unit in North Carolina reducing water rates in several areas in South Carolina, in return for flow in the River, from which certain South Carolina citizenry benefit immensely, and all of which South Carolina has approved.

Of particular note, in seeking to enjoin UC-NC's IBT, South Carolina does not target CRWSP as an "agent" of North Carolina, which does not in any respect direct CRWSP's operations. Rather, North Carolina has merely authorized the IBT as consistent

with state law. Nor does South Carolina target CRWSP as an "agent" of South Carolina either.

The Special Master also correctly rejected South Carolina's "theory" that "any decree by the Court would simply limit North Carolina to a fixed amount of water that North Carolina could allocate to uses within the state—thus rendering irrelevant any consideration of particular existing uses by the Intervenors or other users," recognizing that there was "no precedent supporting such a narrow conception of the apportionment inquiry." Report 35. To the contrary, this Court's practice is to "engag[e] in a detailed consideration of existing uses and other conditions as part of an equitable apportionment analysis." *Id.*

South Carolina cites the Special Master's Eighth Case Management Order (CMO No. 8) to argue that "the Special Master has concluded" that "South Carolina's Complaint does not seek to enjoin any particular transfer" because it "prays for a decree equitably apportioning the Catawba River and enjoining *any and all* withdrawals from the River in excess of North Carolina's equitable share." S.C. Exceptions Br. 43 (emphasis in original). This is an attempt to make a silk purse of the sow's ear that the Complaint seeks to enjoin *more* IBTs than just CRWSP's. The Special Master recognized, at that stage of the proceedings, that she would construe the Complaint broadly and not *limit* South Carolina in discovery as if it merely requested that particular IBTs would be enjoined. But the Special Master clearly understood and believed that South Carolina seeks an injunction against CRWSP's IBT. She reiterated that the Complaint "alleges that these

interbasin transfers from the Catawba" are "'in excess of North Carolina's equitable share'" and "seeks a decree 'enjoining North Carolina from authorizing transfers of water from the Catawba River, past or future, inconsistent with that [equitable] apportionment.'" CMO No. 8, at 3 (quoting Compl. 10 & ¶¶ 4, 24).

d. Beyond South Carolina's Specific Request For Injunctive Relief, Its Request To Equitably Apportion The Catawba River May Result In Limits On Particular Water Users

This Court's rulings confirm that, consistent with the allegations of South Carolina's Complaint, the decree in an equitable apportionment case regularly specifies the lawfulness of particular intra-state water uses. South Carolina's attempt to suggest that the decree could do no more than allocate some water to itself and the remainder to North Carolina, and would not define CRWSP's rights, is thus unfounded. *Contra* U.S. Br. 11 (asserting that in equitable apportionment actions, "the Court determines the *overall* share of water to be allocated to each State, and state law then determines how that share is to be allocated among individual water users" (emphasis in original)); *id.* 20.

Wyoming v. Colorado illustrates why South Carolina is incorrect. The Court's decree in that case did not merely specify Colorado's entitlement to water. Rather, it awarded 18,000 acre-feet to Skyline Ditch; 15,500 acre-feet to the Laramie-Poudre Project (which diverted water from the Laramie River to the Poudre watershed); 4,250 acre-feet to certain

meadowland irrigation; and 2,000 acre-feet to the Wilson Supply Ditch. *Wyoming v. Colorado*, 298 U.S. 573, 579 (1936) ("the Colorado claims which the decree recognizes and confirms are the only ones [that] may be made as against Wyoming and her appropriators").

Nebraska v. Wyoming demonstrates the same point. There, the decree did not merely allocate water among the states (325 U.S. 665, 667 (1945)) – it also defined the relative priority of four Wyoming reservoirs and specified the rates of diversion for five Nebraska appropriators (*id.* at 666-67).

Indeed, even in the course of opposing CRWSP's intervention, South Carolina has stressed that, wholly apart from any particular injunction, the ruling it seeks will circumscribe the rights of CRWSP to withdraw water from the Catawba River:

> This Court has made clear, however, that allocations *within a state* are necessarily constrained by the apportionment decrees dividing water *between States*. *See Hinderlider*, 304 U.S. at 106 (holding that an "apportionment [by this Court] is binding upon the citizens of each state and all water claimants," even where the State had previously allocated state-law water rights among individual claimants); *see also Nebraska v. Wyoming*, 515 U.S. at 22. Thus, as to the equitable share between the party States, municipalities' rights – regardless of their authority granted under state law – "can rise no higher than those of [the party State], and an adjudication of the [State's] rights will necessarily bind [them]." *Nebraska v. Wyoming*, 295 U.S. at 43

S.C. Br. in Opp. to CRWSP Intervention 4-5. And even to the extent that a state could later reallocate these intra-state rights in certain cases, the relevant point is that the Court's decree would define them in the first instance.

Thus, even if this Court denies South Carolina's request for an injunction, it is easy to conceive of other respects in which this Court's decree will directly affect CRWSP. An emerging theme of South Carolina's position in this litigation goes well beyond IBT to allege that North Carolina's water use from the Catawba generally should be curtailed in times of low flow. Any such mandated conservation would raise a direct question regarding UC-NC's water consumption from CRWSP. Alternatively, the Court could favor North Carolina's position and conclude that CRWSP's withdrawals for South Carolina residents are inequitable and should be reduced. In any of these scenarios, there is every prospect that this Court's decree will specify CRWSP's permitted volume of water consumption.

In sum, South Carolina's bald assertion that "CRWSP's interest in water consumption (in either States) are far from unique or compelling" (S.C. Exceptions Br. 46) lacks merit and the Special Master properly concluded that CRWSP has a "compelling interest" in intervening (Report 28). The Special Master correctly refused to "conclude that interbasin transfers are not central to the Complaint (they are) or that South Carolina did not seek to enjoin the transfers to these municipalities authorized by North Carolina (it does)." Report 38.

III. The Party States Will Not Adequately Represent CRWSP's Compelling Interest In The Outcome Of This Litigation

Not only is CRWSP's interest in this litigation substantial, concrete, and immediate, but that bi-state interest will not be represented by either one of the party states. Neither South Carolina nor North Carolina will advocate in favor of CRWSP's current and anticipated uses of the Catawba River, because each party state has a significant interest in limiting one aspect of CRWSP's operation – *viz.*, the withdrawals for residents of the other state.

Nor will either state's failure to promote vigorously CRWSP's position result from the state's own "intramural" decision about how the Catawba's waters should be divided within state borders. Rather, each state's adversity towards the other inevitably carries with it an adversity to an important component of CRWSP's apportionment of the River. Given that South Carolina is seeking to reduce North Carolina's water withdrawals, it is no wonder North Carolina is presently disinclined to champion unqualifiedly North Carolina local government withdrawals from South Carolina. The conflicts between CRWSP and the party states are thus *inter*mural and a proper basis for intervention in this Court. There is accordingly no merit to South Carolina's assertion (S.C. Exceptions Br. 45) that the Special Master "ignore[d]" that "CRWSP's interests are adequately represented by the party States."

On the one hand, South Carolina is obviously hostile to CRWSP's interests. Not only does South Carolina seek an injunction against CRWSP's

transfer of water to UC-NC for 5 MGD of IBT (*see supra* at 12-16), but it has chosen the vehicle of an equitable apportionment action to seek that relief notwithstanding that it has specifically *approved* that very IBT under South Carolina law. *See supra* at 6. Indeed, South Carolina's Brief in support of its exceptions asserts that CRWSP "withdraws water on the South Carolina side of the boundary and transfers it for use on the North Carolina side" (*id.* 9), and on that basis describes CRWSP as "a stalking horse for North Carolina water users" (*id.* 46). Although that characterization omits any of CRWSP's withdrawals for the benefit of South Carolina residents (*see infra*), it helpfully captures the state's patent hostility to CRWSP's interests.

Further, as South Carolina seeks to expand the scope of its suit to challenge more broadly the lawfulness of the volume of North Carolina residents' consumption of water from the Catawba River (*i.e.*, to seek to limit all consumption, not merely IBT (*see supra*)), that shift highlights South Carolina's inability to represent CRWSP's interests. Such an expanded conception of the Complaint would attack the legality of not only UC-NC's 5 MGD of IBT but its *entire* transfer of water from CRWSP, much of which is consumed in the Catawba River Basin and therefore does not qualify as IBT.

South Carolina nonetheless asserts that it "'must be deemed to represent all its citizens,' including its political subdivisions such as LCWSD," even when the State is jeopardizing LCWSD's rate structure. S.C. Exceptions Br. 45 (quoting *New Jersey v. New York*, 345 U.S. 369, 372 (1953) (per curiam)). But the quoted language from *New Jersey v. New York* did

not hold – as South Carolina's excerpt is intended to suggest – that non-sovereigns always are represented by the states in which they are located, with the consequence that they are forbidden from ever intervening in equitable apportionment actions. Rather, the Court merely addressed the scope of the "[t]he '*parens patriae*' doctrine." 345 U.S. at 372. In determining whether intervention was permitted, the Court proceeded to consider whether the intervenor had "some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state." *Id.* at 373. *See infra* Part IV.

Elsewhere, South Carolina correctly recognizes that this Court's precedent "*presumes* that States act as *parens patriae* in representing the interests of all citizens of the State." S.C. Exceptions Br. 1 (emphasis added and omitted). Here, CRWSP has an interest in its own right in the outcome of this litigation that South Carolina does not represent. That interest overcomes any presumption that intervention is inappropriate because the state sufficiently represents CRWSP's interests.

On the other hand, North Carolina will not represent CRWSP's interests, and North Carolina conspicuously has never asserted that it could. South Carolina argues to the contrary that "North Carolina has stated directly that it 'has every reason to defend the IBTs that it has authorized for the benefit of its citizens.'" S.C. Exceptions Br. 45. But North Carolina made that statement with respect to Charlotte, not CRWSP's withdrawal for UC-NC. That 5 MGD of IBT originates from a plant operating

on a segment of the River within South Carolina. North Carolina, by contrast, has a significant interest in maximizing water flows above the state line, notwithstanding that less water is available to CRWSP (and hence UC-NC) as a consequence.

Even assuming North Carolina has a sufficient reason to support that particular North Carolina IBT that reason does not remotely establish that North Carolina's interests are aligned with those of CRWSP. The IBT represents only one portion of CRWSP's withdrawals. As the Special Master explained, "In total, CRWSP may draw 36 million gallons of water per day from the Catawba, and *5 of these 36 million gallons* represent the Union County [authorization] about which South Carolina complains." Report 26 (emphasis added).

Overall, roughly half of CRWSP's water withdrawals are for the benefit of South Carolina residents. This includes approximately 2 MGD of LCWSD-SC's IBT within South Carolina. The fact that this is an equitable apportionment action opens the door to claims by *North Carolina* that this Court should order reduced consumption on the South Carolina side of the border. Contrary to the contention that North Carolina will represent CRWSP, North Carolina has every interest in positioning itself adversely to CRWSP with respect to those withdrawals. In defending against an attempt to reapportion the River, North Carolina is likely to maintain that significant withdrawals within South Carolina, including IBTs there, are inequitable and should be reduced.

Conversely, CRWSP has a heightened interest in an apportionment of the Catawba River that

increases the volume of water that crosses the state line, and thus ensures more water is available in times of low flow at the point of CRWSP's intake. That interest would support limitations on withdrawals from the River in North Carolina. By contrast, as noted, North Carolina's principal interest is in advocating for an apportionment that allocates a larger proportion of water to be withdrawn before it crosses into South Carolina.

CRWSP also has a distinct interest, adverse to both States, in avoiding the entry of a decree by this Court under the doctrine of equitable apportionment. CRWSP has *state* common law riparian rights to withdraw water from the free-flowing portion of the Catawba River. *See Lowcountry Open Land Trust v. State*, 347 S.C. 96, 107, 552 S.E.2d 778, 784 (S.C. Ct. App. 2001) ("[I]n addition to those rights of the public at large, a riparian owner possesses a property right incident to his ownership of the bank and bed to the thread of the watercourse" and "[o]wners of riparian land possess rights 'relating to the water, its use [and the] ownership of soil under the [water]'" (alterations in original) (citing Black's Law Dictionary)). The principal purpose of this case, by contrast, is the entry of a decree that will announce superseding rights to the water as a matter of *federal* common law. Whichever State prevails in its efforts to secure greater water rights – South Carolina or North Carolina – the upshot is that CRWSP's existing property rights and ongoing rights to operate are at least threatened. Each state will thus be significantly conflicted from championing and protecting CRWSP in this controversy.

It is worth noting that the significant conflicts that exist between CRWSP and the party states are only amplified when considered in the context that this case is focused on periods of low flow in the River and the prospect of continued growth in water demand. Consumption from the River is in many respects zero-sum under those conditions. Each state accordingly has an overriding interest in exclusively pursuing its own overall water demand, to the inevitable significant detriment of CRWSP.

South Carolina lodges a straw man argument (*see* S.C. Exceptions Br. 45-46) that CRWSP's dual-state nature does not elevate it to the status of sovereign. Intervention in equitable apportionment actions is not limited to sovereigns. *See infra* Part IV. The relevant point is that neither of the sovereigns which *are* parties to the litigation will represent CRWSP's compelling interests. CRWSP accordingly has no option but to intervene to protect those interests itself.

Finally, South Carolina broadly overstates matters when it asserts (S.C. Exceptions Br. 11 n.9) that the Special Master "rejected . . . CRWSP's argument that it was entitled to intervene based on its bi-state status." In fact, the Special Master only reasoned that CRWSP's bi-state status was not "compelling, *standing alone*, as a basis for intervention." Report 27 (emphasis added). CRWSP's position is not that it is entitled to intervene merely because it is a significant water user or because it is a joint venture of governments from both states. Rather, as the Special Master found, CRWSP has a compelling interest in the

outcome of the case that the party states will not themselves represent.

IV. The Special Master Properly Recognized That CRWSP's Limited Role In The Litigation Reinforces The Conclusion That Intervention Is Appropriate

Having correctly concluded that that the party states cannot and will not represent CRWSP's compelling interests, the Special Master took care to ensure that CRWSP's intervention would only assist, not impede, the course of litigation. The Special Master recommended that intervention be granted for the "limited purpose" of CRWSP pursuing its own unique interests in the outcome of the litigation. Report 28.[1]

CRWSP is limited in its discovery and presentation of expert testimony to matters relating to its own water consumption. CRWSP could not, for example, propound interrogatories and document requests initiating its own separate factual inquiry about an issue not joined in the litigation against it, such as intramural questions relating to a distant water user's consumption from the River. Furthermore, as an additional practical matter,

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[1] *Cf.* Adv. Comm. Note, Fed. R. Civ. P. 24(a)(1) (intervention as a matter of right "may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings"); *J.B. Stringfellow, Jr. v. Concerned Neighbors in Action*, 480 U.S. 370, 382 n.1 (1987) (Brennan, J., concurring) ("Even highly restrictive conditions may be appropriately placed on a permissive intervenor.").

CRWSP will have a major financial incentive arising from the cost of the litigation to limit its participation to protecting its own interests, without gratuitously expanding its role to include other unrelated questions.

South Carolina thus substantially misstates the Special Master's ruling in asserting that CRWSP was permitted to intervene "with rights [afforded] full parties." Br. 1. South Carolina nowhere acknowledges the significant constraints accompanying the recommendation that intervention be granted. The Special Master expressly rested the intervention ruling on "the simple principle, conceded by the Intervenors, that an intervenor's participation in an original case should be directed toward protecting that intervenor's interest and not as a means to litigate all aspects of the dispute, even those that do not affect the intervenor." Report 34. By contrast, a "full part[y]" (S.C. Exceptions Br. 1) such as South Carolina or North Carolina has far more expansive authority to develop factual and legal claims relating to the entire breadth of the case. CRWSP's participation is significantly more cabined.

South Carolina equally errs in stating that CRWSP argued "that the Special Master's recommendation granted them full party status in all phases of the litigation." S.C. Exceptions Br. 12. In fact, it was CRWSP that *proposed* the limits on its participation. *See, e.g.*, Oral Arg. Trans. on Motion to Intervene 53 (Mr. Goldstein) ("I think you can limit our intervention. I think that's what the Supreme Court's case law says. . . . [T]he Supreme Court is saying that you have to respect the things that you are subsidiary to the sovereign, and the sovereign

represents your interests."); *id.* ("We're here to focus on the things that directly affect us, and that's what we propose that you would hear from us about, and so that we would sort of self-condition our participation in the case on that con[straint]."); *id.* 53-54 (CRWSP is "just here to make sure that you have the benefit of their knowledge about the water and what's going on in that part of the River, and the people who get water from it, and the consequences of interbasin transfer, and somebody to stand up for their interest. They have no desire whatsoever to get more deeply involved in the case.").

By failing to appreciate CRWSP's limited role in the litigation, South Carolina understates the merits of CRWSP's motion to intervene in several respects. *First*, there is no prospect that CRWSP's participation will "transform an equitable apportionment action between two sovereign States into an intramural dispute." *Contra* S.C. Exceptions Br. 1. Despite its repeated protests that this Court's original jurisdiction is not a forum for CRWSP "to protect their water rights vis-à-vis other water users in their own State" (*id.* 24), South Carolina never illustrates how intervention in fact threatens to draw this Court into a fight over the allocation of water within either of the two party states. But in any event, the Special Master sensibly preempted any such concern by limiting CRWSP's participation to the issues related to whether its own water withdrawals should be deemed inequitable.

Second, and relatedly, CRWSP's intervention for a limited purpose substantially minimizes any burden that arises from its participation. Indeed, in taking exception to the Special Master's Report,

South Carolina does not argue at any length that intervention has unduly inconvenienced it. That argument would fail in light of the Special Master's logical conclusion – which should be afforded considerable deference – that intervention will definitely aid the speedy and accurate disposition of the case. CRWSP is positioned to provide the Special Master, the party states, and the Court with substantive, direct experience on the question of the proper apportionment of the Catawba River. CRWSP exists for the very purpose of withdrawing and distributing water from the River, which is a complicated bi-state undertaking, and it has developed tremendous expertise over the course of the past two decades, which is why it has been active in hydroelectric re-licensing, the Water Management Group for the Catawba River, and the Drought Management Advisory Group. The Attorneys General of South Carolina and North Carolina, by contrast, have no remotely equivalent role.

Relatedly, any suggestion by South Carolina that intervention will be excessively burdensome is contradicted by its parallel assertions about discovery from CRWSP if it is not allowed to intervene. South Carolina contends that the parties are perfectly capable of conducting discovery on the issues related to CRWSP's consumption. Further, it asserts that CRWSP can present its substantive arguments to the Special Master in the role of an *amicus curiae*. The upshot is that, by denying CRWSP's motion to intervene, this Court would not materially reduce the volume of litigation. It would only serve to deny CRWSP of the right to defend itself, including presenting facts and expert reports that will

materially assist the Special Master, on the allegations against it by South Carolina on a matter of profound importance to CRWSP's very existence.

Third, concomitant to its limited role, CRWSP does not seek relief against either of the party states or against any other intervenor. CRWSP does not, for example, seek a decree authorizing it to expand the volume of water available at its intake, such as by directing North Carolina to reduce its consumption and South Carolina to enhance its conservation measures upstream of CRWSP's intake. CRWSP's role is instead defensive. CRWSP has the right to controvert factually and legally any claims by the party states that CRWSP's consumption is inequitable. By contrast, in cases in which the participation of non-sovereigns is not so limited, intervention is correctly disfavored because there is the prospect that a request for relief against a state could contravene the state's immunity from suit under the Eleventh Amendment. *See* S.C. Exceptions Br. 18 n.11.

V. This Court's Precedents Establish That CRWSP's Intervention Is Appropriate

The decisions of this Court flexibly assess competing considerations in determining whether a particular request to intervene in an original action should be granted. The putative intervenor's distinct interest in the suit is balanced against the presumption that its home state will represent that interest and the prospect of wide-scale intervention that would render the litigation unmanageable. Here, the balance of those considerations tips decisively in favor of permitting CRWSP's

intervention. Each state is affirmatively hostile to various aspects of CRWSP's withdrawals from the Catawba. Further, CRWSP's unique status would not open the door to intervention by mere users of water.

1. This Court's jurisprudence on the standard governing the intervention by non-sovereigns in original actions is not extensive. In *New Jersey v. New York*, 345 U.S. 369 (1953) (per curiam), this Court considered the City of Philadelphia's motion to intervene in an original action brought by New Jersey against the State of New York and New York City over the diversion of the Delaware River. Philadelphia sought to protect its interest in the flow of the river. This Court held that a proper intervenor would show "some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state." *Id.* at 373. That standard, the Court explained, served a dual purpose: (i) consistent with the principle of *parens patriae*, it respected the states' "sovereign dignity" in representing their citizenry by avoiding "an intramural dispute over the distribution of water within the [state]"; and (ii) it facilitates "good judicial administration." *Id.*

Because Philadelphia's claimed right to intervention was so weak, the facts of *New Jersey v. New York* did not present the opportunity to elaborate on either the nature of the private interest or the tension between the interests of the intervenor and the party states that would justify intervention. In that case, the State of Pennsylvania had already entered the case "to protect the rights and interests

of Philadelphia and Eastern Pennsylvania." 345 U.S. at 374. Indeed, Philadelphia was "unable to point out a single concrete consideration in respect to which the Commonwealth's position does not represent Philadelphia's interests." *Id.* Philadelphia's position was "invariably" advanced by Pennsylvania. *Id.* Further, because Philadelphia was situated no differently than any other water user, its intervention would threaten the manageability of the case because the same rationale would open the door to intervention by innumerable cities and industrial facilities. *Id.* at 373.

Later cases have illuminated the circumstances in which intervention is appropriate. In *Texas v. Louisiana*, 426 U.S. 465 (1976), the Court considered a seaward boundary dispute among Texas, Louisiana, and the United States. The United States claimed title to islands in the Sabine River. This Court granted a motion to intervene by the City of Port Arthur, which asserted title to some of the contested island land. *Id.* at 466. Though the State of Texas was already a party to the case, this Court reasoned that the City could "intervene for the purposes of protecting its interests in the island claims of the United States." *Id.* *Contra* S.C. Exceptions Br. 33 (asserting that Port Arthur "asserted its title to the property not only against the United States, but also against the State," notwithstanding that there is no indication that the State disagreed with Port Arthur's position).[2]

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[2] *Compare Arizona v. California*, 530 U.S. 392, 419 n.6 (2000) (noting denial of intervention of association of land

Subsequently, in *Maryland v. Louisiana*, 451 U.S. 725 (1981), eight states brought an original action against Louisiana challenging a tax imposed by Louisiana on natural gas pipelines on gas imported into that state. The states complained that the tax caused them to pay a higher price for gas. Seventeen pipeline companies sought to intervene. Though the states (as gas purchasers) and pipelines (as the taxpayors) had different "interests" that drove their participation, their claims were identical, their goal of invalidating the tax was the same, and if the states prevailed the pipelines would be entitled to refunds. Report of the Special Master, *Maryland v. Louisiana*, No. 83, Orig. 7-8 (May 14, 1980). *Contra* S.C. Exceptions Br. 35. This Court nonetheless permitted intervention. The Court reasoned that it is "not unusual to permit intervention of private parties in original actions." 451 U.S. at 745 n.21. In that case, intervention was appropriate because the pipelines had a "direct stake in the controversy" because Louisiana required them to pay the tax. *Id.* Further, participation by the pipeline companies would assist in "a full exposition of the issues." *Id.*

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leaseholders who "do not own land in the disputed area" and "make[] no claim to tile or water rights," and those whose interests will "not be impeded or impaired by the outcome of this litigation"). *Cf. Utah v. United States*, 394 U.S. 89, 92 (1969) (motion to intervene by resident of party state would have "substantial basis" if that state "sought to invoke [intervenor's] title" to disputed lands to defeat the claims of another party); *Oklahoma v. Texas*, 258 U.S. 574, 581 (1922) (intervention granted to private landowners with interest in boundary dispute).

Most recently, in *Nebraska v. Wyoming*, No. 108, Orig., Nebraska sought to enforce a previous decree in an original action against Wyoming regarding the latter's upstream water use of the Laramie River. A Wyoming utility that supplied power to both states sought to intervene as a defendant. Both the utility and Wyoming maintained that the River was immune from equitable apportionment because it was fully appropriated between Wyoming and another state (Colorado). The Special Master accordingly recommended that intervention be denied because the utility "had not shown a compelling interest in its own right that would not be properly represented by Wyoming." First Interim Report of the Special Master, *Nebraska v. Wyoming*, No. 108, Orig. 12 (June 14, 1989) (citing *New Jersey v. New York*, *supra*). The utility did not contest that recommendation, which this Court accepted. 507 U.S. 584, 589-90 (1993).

But the circumstances changed, with the consequence that the interests of the utility were no longer completely aligned with those of either party state. This Court rejected the theory that the River was fully appropriated, which previously bound the utility's position with Wyoming's. *Id.* at 596-97. Wyoming also declined to defend the utility's interests entirely and "might yet have to weigh and balance competing Wyoming interests." Seventeenth Memorandum of Special Master, *Nebraska v. Wyoming*, No. 108, Orig. 3, 11-12 (Apr. 2, 1999) (*Nebraska* Intervention Order). Further, the eventual decree could adopt an "injunction against Wyoming" reflecting the shared position of Nebraska and the utility regarding certain water releases, and

"Wyoming can hardly be put in the position of presenting evidence to support an injunction against itself." *Id.* 12.

For its part, Nebraska argued that the utility's water use should count against Wyoming's apportionment and sought to require additional water releases from the utility's impoundment. The Special Master also recognized that "it would be unusual, to say the least, for one state to act as *parens patriae* over another state's citizen." *Id.* 11.

In response to these developments, the Special Master concluded that neither party state would fully defend the utility's interest and granted the utility's renewed motion to intervene "for the limited purpose of protecting its [individual] rights." *Id.* 10. The Special Master recognized that "the policy considerations that limit private-party participation in original proceedings do not come into play in a situation like this where [the private party] enters the case for a limited purpose and has no appropriate *parens patriae*." *Id.* 13. *Contra* S.C. Exceptions Br. 22, 37 & n.28 (extensively relying on denial of utility's motion to intervene, without acknowledging Special Master's subsequent order granting intervention).

The line from *New Jersey v. New York* to *Nebraska v. Wyoming* illustrates that a private party's request to intervene in an original action implicates competing considerations. Favoring intervention is the fact that the decree may bind the putative intervenor and have tremendous implications for its rights and interests. Disfavoring intervention are the facts that sovereign states are presumed to represent their citizens (and thus to

sufficiently protect those private interests) and that wide-scale intervention would threaten the manageability of the litigation of original matters.

The outcome of the particular cases reflects the balance of those competing considerations on the facts of each. In *New Jersey v. New York*, the City of Philadelphia asserted only the interest of a large water user, which was already protected by the participation of Pennsylvania and which did not differentiate the City from innumerable other potential intervenors.

By contrast, in the Court's subsequent cases, the putative intervenor had a significant, unique interest in the litigation. Intervention was accordingly permitted. In *Texas v. Louisiana*, though the State of Texas was a party, one of its constituent municipalities (the City of Port Arthur) was permitted to intervene to assert title to disputed property. Similarly, in *Maryland v. Louisiana*, although several states participated in the case, individual pipeline companies which paid the tax at issue in the litigation were permitted to intervene. In *Nebraska v. Wyoming*, intervention was permitted by a utility that functioned as a bi-state entity and faced competing demands by the party states on its water uses. The common elements of those three rulings were that, in each, the intervenor's interest was personal to itself and distinct from that of other citizens.

As the Special Master recognized, this Court notably has not limited intervention to circumstances in which there was a "conflict of interest or some other disabling factor that would prevent the party state from representing the proposed intervenor's

interests." Report 23. Rather, intervention has been permitted when the facts showed that the party states would not fully and effectively represent the intervenor's interests. In *Texas v. Louisiana*, the State of Texas could represent the interests of its citizens and sub-units of government. In *Maryland v. Louisiana*, the states pursued the identical claim as the pipelines and it was acknowledged that (if the claim succeeded) the Court's eventual decree would confer on the pipelines a right to a refund. By contrast, the City of Philadelphia could not identify "a single concrete consideration" in which Pennsylvania failed to represent its interests. 345 U.S. at 374. *See also* Report 14-16 (noting that the same conclusion is supported by decisions permitting private parties to be named as party defendants in original actions).[3]

Nor is there merit to the Solicitor General's contention that the standard governing intervention in equitable apportionment suits (such as *New Jersey*

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[3] The Special Master was attentive to the principle that intervention is appropriate only when the party states will not represent the putative intervenor's interests. Report 13, 23 (citing *New Jersey v. New York*, 345 U.S. at 373). After careful study of this Court's precedents, the Special Master recognized that in a particular case a state's representation may not be fully adequate, notwithstanding the absence of a disabling conflict of interest, when the intervenor (i) is the "instrumentality authorized to carry out the wrongful conduct or injury for which the complaining state seeks relief," (ii) has "an independent property interest that is directly implicated by the original dispute or is a substantial factor in the dispute," or (iii) has "a 'direct stake' in the outcome of the action." Report 21.

v. New York) is more rigorous than that applicable to other original actions governing, for example, property rights (such as *Texas v. Louisiana*). *See* U.S. Br. 15-17. The Special Master properly rejected the assertion that there is a "special rule applicable only to equitable apportionment cases." Report 24. The Court's solicitude for a state's sovereign interests and its concern for the manageability of original actions is equivalent in both contexts.

The Solicitor General theorizes that in equitable apportionment actions the state acts as sovereign on behalf of its citizens who are, as a consequence, bound by the decree. It is undisputed that no decision of this Court has ever articulated distinct standards for intervention *or* otherwise adopted that rationale. Nor does South Carolina even embrace such a distinction. That is not surprising. The *parens patriae* doctrine applies equally, and the state functions as a sovereign, in all original actions. *E.g.*, *Alfred L. Snapp & Son v. Puerto Rico*, 458 U.S. 592, 593, 600-08 (1982) (State has a quasi-sovereign interest "in the health and well-being – both physical and economic – of its residents in general"); *Pennsylvania v. West Virginia*, 262 U.S. 553, 595 (1923) (holding that Pennsylvania might sue to enjoin restraints on the commercial flow of natural gas and that in suing it protected a twofold interest – one as a proprietor, and the other as the representative of its citizens). Individual citizens are equally bound when the state litigates in a propriety role as when it pursues an equitable apportionment. *Washington v. Washington State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 692 n.32 (1979) (private parties were "citizens of the State of Washington, which was

a party to" prior litigation over fishing rights under a treaty, and "they, in their common public rights as citizens of the State, were represented by the State in those proceedings, and like it, were bound by the judgment").

2. CRWSP satisfies the standard for intervention set out by this Court's precedents. CRWSP's "compelling interest" in the outcome of this case (Report 28), which will determine CRWSP's ability to draw water from the Catawba River and distribute it to its joint venture participants, is beyond serious dispute. Indeed, South Carolina seeks an injunction against a significant element of CRWSP's operations that would threaten CRWSP's ability to provide water to hundreds of thousands of individuals.

The nature of that interest moreover easily distinguishes CRWSP from almost any other potential intervenor. Not only does South Carolina's complaint specifically target CRWSP and seek an injunction against its operations (*see* Part I, *supra*), but neither party state can adequately represent CRWSP's interests (*see* Part II, *supra*). Though a "State is presumed to speak in the best interest of [its] citizens" (*Nebraska v. Wyoming*, 515 U.S. 1, 22 (1995)) that presumption is overcome here. Accepting the Special Master's recommendation thus would neither render this specific suit unmanageable nor set a precedent that invites widespread intervention by mere users of water.

There are, moreover, essential distinctions between the IBT implemented by CRWSP that South Carolina targets in its Complaint and other IBTs authorized under North Carolina law. First, for

purposes of intervention, it is highly relevant that the Complaint seeks an injunction against CRWSP, which establishes beyond any doubt CRWSP's interest in the outcome in the case. *See supra*. The prospect that other IBTs might be affected by the outcome of the case is far more hypothetical. Second, the withdrawal by CRWSP attacked in the Complaint is far more substantial than most. Only two IBT's authorized under North Carolina law are larger, and not surprisingly both are also the subject of the Complaint. *See* Compl. ¶¶ 20(a), 20(b). As a consequence, if South Carolina prevails in this case, North Carolina is very unlikely to be able to engage in sufficient conservation measures that the decree would not affect CRWSP's operations. Put another way, the allegations of the Complaint must at this stage of the proceedings be taken as true, and there is no reasonable prospect that if South Carolina prevails CRWSP's IBT would not be reduced. That manifestly is not true for many other holders of North Carolina IBT permits.

Nor does CRWSP's intervention threaten to draw this Court into an "intramural dispute." CRWSP does not assert any rights against other water users. The Special Master's order recommending that intervention be permitted limits CRWSP's participation and obviates any concern that the litigation would be sidetracked. Because CRWSP asserts no claim against either State, its intervention similarly raises no concern under the Eleventh Amendment. *Arizona v. California*, 460 U.S. 605, 614 (1983); S.C. Exceptions Br. 18 n.11.

The Special Master's order allowing intervention in *Nebraska v. Wyoming* is particularly instructive in

these circumstances. There, a private utility that served both of the party states found itself "caught in the crossfire of [the states'] litigation theories and strategies." *Nebraska* Intervention Order 3. Both Nebraska and Wyoming supported the utility's operations in part, but both also had a significant incentive to limit other aspects of its water uses to favor their own interests. At that point, the utility could not be expected to "be the 'roving child of various parens patriae.'" *Id.* 12. The Special Master accordingly permitted the utility to intervene for the limited purpose of protecting its interests.

CRWSP's position in this litigation as a bi-state supplier of water is indistinguishable, and the Special Master appropriately recommended allowing it to intervene for the limited purpose of protecting its unique interests. South Carolina asks this Court to presume that it will support CRWSP's operations to some extent (because the plant supplies water to its citizens) and that North Carolina will have a parallel interest to the extent of its own residents' consumption. But that argument paints only half of a picture of the States' litigating position with respect to CRWSP. Most important, just as in *Nebraska v. Wyoming*, it fails to account for the respects in which each State has an incentive to assail CRWSP's withdrawals as a part of the opponent-state's consumption.

This Court should also hesitate to overturn the Special Master's judgment – reached after very considerable study – that CRWSP's participation as a party will assist in the disposition of the case. *Cf.* *Arizona* v. *California*, 460 U.S. at 614-15; Report of the Special Master, *Alaska v. United States*, No. 128,

Orig. at 19 (Nov. 27, 2001) ("the rules applied in *New Jersey v. New York* are somewhat discretionary"). The Special Master received numerous submissions and held two hearings, as well as numerous case management conferences, that have informed her understanding that intervention would facilitate rather than impede the prompt and orderly disposition of the litigation. Unlike the Attorneys General of the party states, CRWSP has extensive direct familiarity with the hydrology of the Catawba River and the effects of water withdrawals and interbasin transfers. Its active participation in the context of its distinct interest in the case will assist the "full exposition of the issues" (*Maryland v. Louisiana*, 451 U.S. at 745 n.21), and thus the Special Master's resolution of the extremely complicated factual and legal issues presented by South Carolina's Complaint. Nothing in South Carolina's submission suggests that the Special Master is not best positioned to determine how the litigation should proceed.

In sum, it defies logic and sound principles of judicial administration to override the Special Master's determination that CRWSP should be permitted to participate in an action that will decide its fate – including with respect to the injunction against it sought by South Carolina – when none of the parties will otherwise serve as its champion. The Special Master's recommendation should be adopted and CRWSP's Motion to Intervene should be granted for the limited purpose of protecting its interests in the outcome of this case.

CONCLUSION

For the foregoing reasons, this Court should adopt the recommendation of the Special Master that CRWSP be permitted to intervene.

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